

VICE CHAIR:  
LABOR AND EMPLOYMENT

COMMITTEES:  
APPROPRIATIONS  
HEALTH

Assembly  
California Legislature

ALAN NAKANISHI  
ASSEMBLYMEMBER, TENTH DISTRICT



STATE CAPITOL  
P.O. BOX 942849  
SACRAMENTO, CA 94249-0010  
(916) 319-2010  
FAX (916) 319-2110

DISTRICT OFFICE  
218 WEST PINE STREET  
LODI, CA 95240  
(209) 333-5330  
FAX (209) 333-5333

January 17, 2007

Rob Feckner, President  
CalPERS Board of Administration  
P.O. Box 942701  
Sacramento, CA 94229-2701

Dear President Feckner:

I am writing to make you aware of a legal opinion written by Legislative Counsel that affects your organization.

Last fall I received a complaint from a constituent that campaign activity took place inside a state building. The campaigning was for a position on the CalPERS Board of Administration. My constituent requested a legal opinion from Legislative Counsel to see if the use of a conference room in a state building for CalPERS related campaign activities was a violation of Section 8314 of the Government Code, which prohibits use of public resources for campaign activity.

Please find attached the legal opinion from Legislative Counsel. I hope that you will use this information as you see fit.

Sincerely,

A handwritten signature in black ink, appearing to read "Alan Nakanishi".

ALAN NAKANISHI  
Assemblyman, 10<sup>th</sup> District

Enclosure

CC: James McRitchie

DEC 19 2006



LEGISLATIVE COUNSEL

Diane F. Boyer-Vine

CHIEF DEPUTIES

Jeffrey A. DeLand  
Daniel A. Weitzman

PRINCIPAL DEPUTIES

Alvin D. Gress  
Michael J. Kersten  
Kirk S. Louie  
John T. Studebaker  
  
Joe Ayala  
Cindy M. Cardullo  
Edward Ned Cohen  
Ben E. Dale  
Debra Zidich Gibbons  
Patricia Hart Jorgensen  
Michael R. Kelly  
Diana G. Lim  
Romulo I. Lopez  
Robert A. Pratt  
William K. Stark  
Jeff Thom  
Richard B. Weisberg

DEPUTIES

Paul Antilla  
Santiago Avila-Gomez  
Scott A. Baxter  
Vanessa S. Bedford  
Carrie L. Brown  
Ann M. Burastero  
Eileen J. Buxton  
Gwynnæ L. Byrd  
Sergio E. Carpio  
William Chan  
Emilia Cutrer  
Byron D. Damiani, Jr.  
J. Christopher Dawson  
Stephen G. Dehrer  
Linda B. Dozier  
Krista M. Ferns  
Sharon R. Fisher  
Lisa C. Goldkuhl  
Jennifer M. Green  
Maria Hilakos Hanke  
Charlotte L. Hasse  
Amy J. Haydt  
Baldev S. Heir  
Thomas R. Heuer  
Russell H. Holder  
Oksana G. Jaffe  
Marian M. Johnston  
Valerie R. Jones  
Lori Ann Joseph  
Thomas J. Kerbs  
Michael J. Kerins  
Jacqueline R. Kinney  
Jennifer R. Klein  
Eve B. Krotinger  
L. Erik Lange  
Felicia A. Lee  
Mira A. Macias  
Mariana Marin  
Anthony P. Márquez  
Francisco A. Martin  
Christine N. Maruccia  
Fred A. Messerer  
Cecilia A. Moddelmog  
William E. Moddelmog  
Sheila R. Mohan  
Abel Muñoz  
Gerardo Partida  
Mari C. Perez  
Sue-Ann Peterson  
Michael Pinkerton  
Lisa M. Plummer  
Patricia Gates Rhodes  
Deborah J. Rotenberg  
Michelle L. Samore  
Aaron D. Silva  
Jessica L. Steele  
Ellen Sward  
Mark Franklin Terry  
Bradley N. Webb  
Armin G. Yazdi  
Jack Zorman

OFFICE OF LEGISLATIVE COUNSEL

State Capitol, Suite 3021  
Sacramento, California 95814

TELEPHONE (916) 341-8000  
FACSIMILE (916) 341-8020  
INTERNET www.legislativecounsel.ca.gov  
EMAIL administration@legislativecounsel.ca.gov

December 18, 2006

Honorable Alan Nakanishi  
Room 5175, State Capitol

**PUBLIC RESOURCES: PUBLIC EMPLOYEES' RETIREMENT SYSTEM BOARD OF ADMINISTRATION ELECTION - #0622073**

Dear Mr. Nakanishi:

You have asked us to discuss whether a state agency, in permitting a state employee bargaining unit to hold a meeting in a state office building during which a member of the Public Employees' Retirement System Board of Administration, seeking reelection, appeared and engaged in campaign activities, violated the prohibition in Section 8314 of the Government Code against the use of state resources for campaign purposes.

You have informed us that the Service Employees International Union Local 1000 (hereafter SEIU Local 1000) sponsored a meeting in a State Department of Education conference room and circulated an informational flier regarding the topics of the meeting. The topics covered at the meeting included state employee pensions, retirement and health care issues, information about the SEIU Local 1000 Council meeting, and an opportunity to "learn about" a member of the Board of Administration of the Public Employees' Retirement System (hereafter the PERS board). The board member was a member of the PERS board who was running for reelection at the time of the meeting. You also informed us that the meeting lasted approximately one hour, of which about one-half hour was devoted to SEIU Local 1000 endorsing the candidate's record and candidacy.

By way of background, the Public Employees' Retirement Law (Pt. 3 (commencing with Sec. 20000), Div. 5, Title 2, Gov. C.<sup>1</sup>) governs the Public Employees' Retirement System, which is a unit of the State and Consumer Services Agency (Sec. 20002). The management and control of the system is vested in the 13-member PERS board (Secs. 20090 and 20120). The number, qualifications, and method of selection of the members of the PERS board is governed by Section 20090, which provides for the election of six members from various specified groups of

<sup>1</sup> All further statutory references are to the Government Code, unless otherwise indicated.

state and local employees, and seven members gathered from various appointed and elected positions in state and local government (see subs. (a) to (g), incl., Sec. 20090). Membership in PERS is mandatory for all state employees with the exception of specific enumerated employee classes (see Sec. 20281 and Sec. 20300 and following).

The PERS board is required to develop election procedures, to cause ballots to be distributed to each member of the system, and to provide for the return of the voted ballots to the board without cost to the member (Sec. 20096). Additionally, the PERS board has enacted regulations to govern PERS board elections (2 Cal. Code Regs. 554 and following). These regulations, in part, require each public agency and each state department to appoint an Agency Election Officer who, among other things, must “ensure the impartiality of the election process within the agency” (2 Cal. Code Regs. 554.1(c)).

PERS board elections are also governed by the Political Reform Act of 1974 (Title 9 (commencing with Sec. 81000); hereafter the PRA), which defines “elective office” to include, among other positions, membership on the PERS board (Sec. 82024). As a result, the PRA also governs the conduct of candidates and other interested parties in PERS board elections (see Sec. 82023). With this overview in mind, we turn to the specific issues presented.

#### A. Holding Union Meetings in State Owned or Leased Facilities

The first issue presented by your question is whether SEIU Local 1000 was authorized to conduct a meeting in a state owned or leased facility. This issue is governed by contract agreements and tentative agreements between SEIU Local 1000 and the state with respect to the use of state facilities, Section 2.5 of the agreement between the State of California and the California State Employees Association (CSEA) covering Bargaining Unit 1<sup>2</sup> states as follows:

“2.5 Use of State Facilities. The State will continue to permit use of certain facilities for Union meetings, subject to the operating needs of the State. Requests for use of such State facilities shall be made in advance to the appropriate State official. When required in advance, the Union shall reimburse the State for additional expenses, such as security, maintenance, and facility management costs or utilities, incurred as a result of the Union’s use of such State facilities.”

As can be seen, the state has agreed, subject to the needs of state business, to permit use of certain state facilities by SEIU Local 1000 upon advance request made to the appropriate state official. Thus, assuming that the appropriate procedures to request the use of the facility were

---

<sup>2</sup> Professional, Administrative, Financial, and Staff Services, effective July 3, 2003, through June 30, 2005, (<http://www.dpa.ca.gov/collbarg/contract/FinalBU1Contract3-15-04.pdf>). See also Section 2.5 of proposed “Agreement between State of California and Service Employees International Union (SEIU) – Local 1000 covering Bargaining Unit 1 Professional, Administrative, Financial, and Staff Services, Effective July 1, 2005 through June 30, 2008” (<http://www.dpa.ca.gov/collbarg/contract/BU01TentativeAgreement2005-2008.pdf>).

followed, we think that SEIU Local 1000 was authorized to hold a union meeting at the time and place of the meeting you have asked us to consider. We next turn to whether the prohibitions of Section 8314 apply to any of the activities undertaken at that meeting.

B. Section 8314 of the Government Code

By way of background, the California courts consistently have held that it would amount to an improper diversion of public funds for an officer or employee of a public agency to cause the money or property of the agency to be used for a purpose having no connection with the affairs of the agency (see Sec. 6, Art. XVI, Cal. Const.; *Stanson v. Mott* (1976) 17 Cal.3d 206, 213-223; *Fair Political Practices Com. v. Suitt* (1979) 90 Cal.App.3d 125, 129-132; *Miller v. Miller* (1978) 87 Cal.App.3d 762, 768-777; *People v. Battin* (1978) 77 Cal.App.3d 635, 647-648; *People v. Sperl* (1976) 54 Cal.App.3d 640, 657-662). Consistent with this principle, Section 8314 prohibits the use of state resources for the purpose of campaign activity or other unauthorized purposes and provides, in pertinent part, as follows:

“8314. (a) It is unlawful for any elected state or local officer, including any state or local appointee, employee, or consultant, to use or permit others to use public resources for a campaign activity, or personal or other purposes which are not authorized by law.

“(b) For purposes of this section:

\* \* \*

“(2) ‘Campaign activity’ means an activity constituting a contribution as defined in Section 82015 or an expenditure as defined in Section 82025. Campaign activity does not include the incidental and minimal use of public resources, such as equipment or office space, for campaign purposes, including the referral of unsolicited political mail, telephone calls, and visitors to private political entities.

“(3) ‘Public resources’ means any property or asset owned by the state or any local agency, including, but not limited to, land, buildings, facilities, funds, equipment, supplies, telephones, computers, vehicles, travel, and state-compensated time.

“(4) ‘Use’ means a use of public resources which is substantial enough to result in a gain or advantage to the user or a loss to the state or any local agency for which a monetary value may be estimated.

“(c) (1) Any person who intentionally or negligently violates this section is liable for a civil penalty not to exceed one thousand dollars (\$1,000) for each day on which a violation occurs, plus three times the value of the unlawful use of public resources. The penalty shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General or by any district attorney or any city attorney of a city having a population in excess of 750,000. If two or more persons are responsible for any violation, they shall be jointly and severally liable for the penalty.

\* \* \*

“(e) The incidental and minimal use of public resources by an elected state or local officer, including any state or local appointee, employee, or consultant, pursuant to this section shall not be subject to prosecution under Section 424 of the Penal Code.”

Thus, Section 8314 prohibits the use of public resources, including state owned or leased facilities and funds, for purposes that include campaign activity as defined in paragraph (2) of subdivision (b) of that section. Additionally, a violation of this section may result in a penalty, determined in a civil action, that is not to exceed \$1,000 for each day a violation occurred plus three times the value of the unlawful use of state resources. Pertinent to your question, paragraph (2) of subdivision (c) of Section 8314 defines “campaign activity” as including an activity constituting, among other things, a “contribution” within the meaning of Section 82015, a provision of the PRA. Thus, we will examine the definition of “contribution” in that section and consider whether the activities you have described fall within the scope of that definition.

### C. Contribution Under the Political Reform Act

Section 82015 defines “contribution” for purposes of the PRA as follows:

“82015. (a) ‘Contribution’ means a payment, a forgiveness of a loan, a payment of a loan by a third party, or an enforceable promise to make a payment except to the extent that full and adequate consideration is received, unless it is clear from the surrounding circumstances that it is not made for political purposes.

“(b) (1) A payment made at the behest of a committee as defined in subdivision (a) of Section 82013 is a contribution to the committee unless full and adequate consideration is received from the committee for making the payment.

“(2) A payment made at the behest of a candidate is a contribution to the candidate unless the criteria in either subparagraph (A) or (B) are satisfied:

“(A) Full and adequate consideration is received from the candidate.

“(B) It is clear from the surrounding circumstances that the payment was made for purposes unrelated to his or her candidacy for elective office. . . .

\*\*\* (Emphasis added.)

Thus, a “contribution” includes a payment, made for “political purposes,” for which full and adequate consideration is not received. Section 18215 of Title 2 of the California Code of Regulations (hereafter Rule 18215), adopted by the Fair Political Practices Commission to implement Section 82015 (see Sec. 83112), reads, in pertinent part, as follows:

“18215. . . .

\*\*\*

“(b) The term “contribution” includes:

\*\*\*

“(3) Any goods or services received by or behested by a candidate or committee at no charge or at a discount from the fair market value, unless the discount is given in the regular course of business to members of the public.

\* \* \*

As can be seen, if a “candidate” receives goods or services at no charge, those goods or services are considered a “contribution” under the PRA, unless the discount is given in the regular course of business to members of the public. In this connection, the PRA defines “candidate,” in part, to mean an “individual who is listed on the ballot ... for nomination for or election to any elective office ...” (Sec. 82007). Thus, in our view, a candidate for a PERS board membership is a “candidate” under Rule 18215 because, as noted above, a position on the PERS board is defined by Section 82024 for purposes of the PRA as an elective office.

Under the facts provided, state resources were used, without charge, to further an individual’s candidacy for the PERS board. Moreover, that use of state resources was made as part of the use of state facilities by SEIU Local 1000 under the express terms of an agreement between SEIU Local 1000 and the state; there is no basis to conclude the same use of the same state facilities would be offered without charge to members of the public during the normal course of the State Department of Education’s business. Accordingly, we think that the PERS board candidate’s use of a state facility at no charge, during an event held by SEIU Local 1000, was a “contribution” under Rule 18215 and Section 82015 and, as a result, a campaign activity within the meaning of Section 8314.

Consequently, in our view, the contribution in question violated the prohibition of subdivision (a) of Section 8314 upon the use of state resources for campaign activity, unless an exception to that prohibition applies.

#### D. Incidental and Minimal Use Exception

According to the express terms of Section 8314, a use of state resources that constitutes a campaign activity, but is only an “incidental or minimal use,” is excepted from the general prohibition against those activities (para. (2), subd. (b), Sec. 8314). Therefore, the use of the state facility under these circumstances would constitute an exception to the definition of “campaign activity” only if the use only constituted an “incidental and minimal use” of the facility.

It is a general rule of statutory construction that when the language of a statute is clear, its plain meaning should be followed (*Droeger v. Friedman, Sloan & Ross* (1991) 54 Cal.3d 26, 38), and that statutory terms should be construed in accordance with the usual and ordinary meaning of the words used (*Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1225). Additionally, exceptions are to be construed narrowly (*Building Profit Corp. v. Mortgage & Realty Trust* (1995) 36 Cal.App.4th 683, 689). Thus, we think the “incidental and minimal use” exception to the general prohibition against the use of state funds for campaign activities contained in Section 8314 should be narrowly construed in accordance with the usual and ordinary meaning of those words.

“Incidental” is defined to mean “subordinate, nonessential, or attendant in position or significance ... occurring merely by chance or without intention or calculation ...” (Webster’s

Third New International Dictionary (1986), p. 1142). "Minimal" is defined to mean "constituting the least possible in size, number or degree: extremely minute" (Id., at p. 1438).

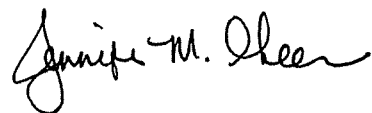
As to the campaign activity in question, it is our view that a PERS board member's use of a state conference room for 30 minutes during a one hour meeting, at no charge and for the express purpose of furthering his campaign for reelection to the PERS board, is not "subordinate," "nonessential," "occurring merely by chance," or "extremely minute." This conclusion is consistent with the examples of permissible "incidental and minimal use[s]" set forth in paragraph (2) of subdivision (b) of Section 8314 which, although not exhaustive, provide guidance as to what is considered "incidental and minimal" uses under that statute and include "referral of unsolicited mail, telephone calls, and visitors to private political entities." Therefore, we think that the campaign activity in question was more than incidental and minimal and, as a result, constituted a violation of Section 8314.

E. Summary

In conclusion, it is our view that the use of the State Department of Education conference room for a meeting of Service Employees International Union Local 1000 was authorized under procedures established in the bargaining agreement between that union local and the state. We also conclude, however, that the use of that state facility for campaign purposes during such a meeting, by a member of the Public Employees' Retirement System Board of Administration seeking reelection to that board, constituted a violation of Section 8314 of the Government Code.

Very truly yours,

Diane F. Boyer-Vine  
Legislative Counsel



By  
Jennifer M. Green  
Deputy Legislative Counsel

JMG:syl